Filed 4/10/19 P. v. Garza CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JESUS ALBERTO GARZA, Defendant and Appellant.	E069534 (Super.Ct.No. INF1601885) OPINION

APPEAL from the Superior Court of Riverside County. Arjuna (Vic) Saraydarian, Judge. (Retired Judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed with directions.

Stephane Quinn, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Seth M. Friedman and Michael Pulos, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant and appellant, Jesus Alberto Garza, attacked a licensed repossessor with a golf club when defendant's girlfriend's car was being possessed. The jury convicted him of assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1).) The trial court suspended imposition of sentence and placed defendant on formal probation for three years. Defendant appealed. Defendant contends (1) the trial court was required to give a unanimity instruction based on the evidence presented at trial, (2) his probation condition that requires residency approval from his probation officer is unconstitutionally overbroad, and (3) the court ambiguously and erroneously imposed probation supervision costs (Pen. Code, § 1203.1), $119.50 attorney's fees (Pen. Code, § 987.8), and court operations assessment and conviction fees (Pen. Code, § 1465.8; Gov. Code, § 70373) as conditions of his probation.

We agree that the sentencing memorandum is ambiguously worded and that the challenged costs and fees cannot be imposed as conditions of defendant's probation. We therefore order the trial court to modify the sentencing memorandum to clarify that defendant is not required to pay these costs and fees as a condition of his probation. We otherwise affirm the probation order.

II.

FACTS

On December 14, 2016, at around 1:00 a.m., Lincoln W., a licensed repossessor, and his assistant, Maritza, went to an apartment in Coachella to repossess a Dodge Challenger owned by defendant's girlfriend. Lincoln was in the process of securing the car to his tow truck when he heard a noise from the nearby apartment. Seconds later, defendant appeared angry and brandishing a golf club in his hand. He yelled at Lincoln, "'You're not taking the fucking car.'" Lincoln responded, "'I'm taking the car. I don't care what you say.'"

Defendant approached Lincoln with the raised golf club while Lincoln stood next to the car's driver side door, and told Lincoln "'[t]he other repo guy fuckedup.'" Lincoln explained that he was repossessing the car. As defendant attacked Lincoln with the golf club, hitting Lincoln's left shoulder and the car, Lincoln told Maritza to call 911, which she did.

As Lincoln drove away from the parking area with the car secured to the tow truck, defendant climbed up on the car's hood. When the car began drifting sideways as it was being towed, Lincoln stopped the tow truck on Tyler Street to secure the steering wheel on the car. Defendant swung the golf club at Lincoln's head, but missed. Lincoln grabbed a long metal bar to defend himself. He hit defendant's foot and repeatedly told defendant to get off the repossessed car. After defendant refused, Lincoln drove off while defendant remained on top of the hood. Moments later, Lincoln heard defendant's

girlfriend scream from down the street. Lincoln noticed that defendant had fallen off the car and onto the ground. Lincoln stopped the tow truck and waited for the police to arrive.

When Deputy Preciado arrived to investigate, he found defendant lying on the ground injured and in pain. Lincoln complained of pain in his left shoulder, he told Deputy Preciado that defendant had hit him with the golf club after he had stopped the tow truck. Deputy Preciado found the golf club in a nearby bush. Deputy Preciado also photographed two dents on the car's driver's side door, which had damage consistent with being hit with a golf club. Defendant was taken to a hospital and treated for a broken fibula. During questioning by Deputy Preciado, defendant did not deny that he had swung a golf club at Lincoln.

Lincoln towed the repossessed car to a private lot owned by the repossessor company in Thousand Palms. Hours later, when Maritza was in the tow yard and went to inventory the repossessed car, she observed that the trunk was open and a message had been carved inside the trunk that said: "'Listen motherfuckers parenthesis repo punks, you never got the car, I gave it up. Pussy got tired of waiting for punks to grow some backbone. Better not see you in my hood all you bitches.'"

Defendant testified in his own defense. He denied swinging, striking Lincoln, and hitting the car with the golf club. Defendant also denied that he told Deputy Preciado anything at the scene. Defendant heard a noise coming from outside the apartment and thought someone was trying to steal the car. He told his girlfriend to call the police, but

she did not make the call. Before he went outside to investigate ,defendant grabbed a golf club. When defendant went outside, he realized his girlfriend's car was being repossessed because it was attached to the tow truck. Defendant decided to throw the golf club down on the ground between some trees. As defendant approached Lincoln, defendant heard Lincoln tell his assistant to call the police.

When Lincoln began towing the car away, defendant picked up the golf club from the ground and jumped onto the car's hood. Defendant then discarded the golf club while Lincoln was driving away. As defendant climbed higher on the repossessed car, Lincoln stopped on Tyler Street and said, "'motherfucker.'" Lincoln got out of the tow truck, approached defendant with a metal baton and hit defendant's knee, causing defendant to fall off the car.

At trial, Deputy Preciado testified that Lincoln had told him that defendant had swung a golf club while Lincoln was trying to open the car's driver side door. The deputy acknowledged that he might have been mistaken about Lincoln's statements.

III.

DISCUSSION

A. *Unanimity Instruction*

Defendant was charged and convicted of one count of assaulting Lincoln with a golf club. He argues the record demonstrates discrete assaultive acts. Defendant contends the first assaultive act occurred when he went outside to investigate and brandished a golf club. A second incident occurred when defendant hit Lincoln's

shoulder and the car. Defendant argues another assaultive act occurred minutes later on Tyler Street when Lincoln stopped the tow truck and defendant swung the golf club towards Lincoln's head but missed. Defendant contends a fourth assaultive act allegedly occurred when defendant struck Lincoln with the golf club while the tow truck stopped on Tyler Street. Based on these separate assaultive acts, defendant argues the trial court was required to sua sponte instruct the jury with CALCRIM No. 3500 (a unanimity instruction).

The People contend a unanimity instruction was not required because defendant's assaultive acts were part of a continuous course of criminal conduct. We agree.

We review assertions of instructional error de novo because resolution of the issue is predominantly legal. (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 568.) We conclude the trial court was not required to instruct the jury with CALCRIM No. 3500 because the evidence showed defendant was engaged in a continuous course of criminal conduct.

"[O]ur Constitution requires that each individual juror be convinced, beyond a reasonable doubt, that the defendant committed the specific offense he is charged with." (*People v. Hernandez, supra*, 217 Cal.App.4th at p. 569, citing *People v. Russo* (2001) 25 Cal.4th 1124, 1132; Cal. Const., art. I, § 16.) CALCRIM No. 3500 states, in part: "The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that

the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed."

"[W]hen the evidence suggests more than one discrete crime, either (1) the prosecution must elect among the crimes or (2) the trial court must instruct the jury that it must unanimously agree that the defendant committed the same criminal act." (*People v. Hernandez, supra,* 25 Cal.4th at p. 569, citing *People v. Brown* (1996) 42 Cal.App.4th 1493, 1499-1500.) "This requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' [Citation.]" (*People v. Russo, supra,* 25 Cal.4th at p. 1132.) On the other hand, where the evidence shows only one crime, but leaves room for the jury's disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the theory of the defendant's guilt. (*Ibid.*)

A unanimity instruction prevents the jury from amalgamating evidence of multiple offenses. (*People v. Hernandez, supra,* 217 Cal.App.4th 559.) Therefore, the instruction must be given sua sponte, even in the absence of a defense request to give the instruction where the evidence supports it. To determine whether a unanimity instruction is required, the trial court must ask (1) whether there is a risk the jury may divide on discrete crimes and not agree on any particular crime, or (2) whether the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, a unanimity

instruction is properly given, but not in the latter. (*Id.* at p. 570, citing *People v. Russo*, *supra*, 25 Cal.4th at p. 1135.) The instruction is not required when the acts alleged are so closely connected they form part of one continuing transaction or course of criminal conduct. The "'"'"'continuous conduct'"'"' rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them. (*People v. Percelle* (2005) 126 Cal.App.4th 164, 181.)

In *People v. Percelle*, *supra*, 126 Cal.App.4th 164, the defendant argued a unanimity instruction was required because there were two separate acts that occurred one hour apart when the defendant attempted to use a counterfeit access card. (*Id*. at p. 182.) However, the *Percelle* court concluded that the continuous course of conduct rule applied because the defendant's conduct was a continuing transaction and the defendant's defense was based entirely upon an asserted lack of proof that the broken card was a counterfeit access card. (*Ibid.*)

Similarly, in *People v. Haynes* (1998) 61 Cal.App.4th 1282, the defendant had two encounters, minutes and blocks apart, that involved the same property. The court found that a unanimity instruction was not required because the acts were closely connected and formed part of one transaction. (*Id*. at p. 1296.)

Here, the evidence shows defendant's assaultive acts represented a single discrete crime. Defendant committed a continuing assault on Lincoln with a golf club as defendant tried to prevent Lincoln from repossessing the car. There was no reasonable basis for requiring the jury to distinguish between assaultive acts committed when

defendant brandished the golf club at Lincoln while the car was being repossessed. The trial court was not required to give a unanimity instruction because the continuous course of conduct rule applies.

B. *The Residence Approval Condition*

As a probation condition, defendant is required to inform his probation officer of his place of residence, and if he moves, obtain residence approval from the probation officer. Defendant argues the condition is unconstitutionally overbroad because it impinges on his right to travel and freedom of association.

The People contend defendant's challenge to the probation condition is forfeited and the condition is not constitutionally overbroad. Although we reject the People's contention that the residence approval condition was forfeited, we conclude the condition is not constitutionally overbroad.

As a general rule, challenges to probation conditions must be made in the trial court at the time of sentencing or the issue is forfeited on appeal. (*People v. Welch* (1993) 5 Cal.4th 228, 237.) The forfeiture rule's purpose is to encourage the parties to bring errors to the attention of the trial court so that they may be corrected in the first instance. (*In re Sheena K.* (2007) 40 Cal.4th 875, 885, 881.) Nevertheless, "where a claim that a probation condition is facially overbroad and violates fundamental constitutional rights is based on undisputed facts, it may be treated as a pure question of law, which is not forfeited by failure to raise it in the trial court." (*People v. Stapleton* (2017) 9 Cal.App.5th 989, 994 (*Stapleton*).)

Because defendant challenges the residence approval condition based on his constitutional right to travel and freedom of association we will reach the merits even though it was not raised in the trial court. Because the issue presents a question of law, we will review it de novo. (*Stapleton*, *supra*, 9 Cal.App.5th at p. 993; see also *In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143.)

A probation condition that impinges on a defendant's constitutional right is overbroad unless it is closely tailored to the compelling state interest in reformation and rehabilitation. (*Stapleton*, *supra*, 9 Cal.App.5th at p. 993; *People v. Olguin* (2008) 45 Cal.4th 375, 378.) To determine whether a probation condition is invalid, we must determine whether (1) the condition is related to the crime of which the defendant was convicted, (2) relates to conduct that is not criminal, and (3) requires or forbids conduct that is not reasonably related to future criminality. (*Olguin*, *supra*, at pp. 379-380.) The "test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term." (*Id.* at p. 379.) "[E]ven if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality." (*Id.* at p. 380.)

The right to travel and freedom of association are constitutional entitlements. (*Stapleton*, *supra*, 9 Cal.App.5th at p. 995.) However, "[n]ot all terms that require a defendant to give up a constitutional right are per se unconstitutional." (*People v. Arevalo* (2018) 19 Cal.App.5th 652, 656.) The question in an overbreadth challenge is

the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

Residence approval conditions are necessary under some circumstances and practical necessity will justify some constitutional infringement. (*Stapleton*, *supra*, 9 Cal.App.5th at p. 993.) For example, in *Stapleton*, the defendant was required to inform his probation officer of his place of residence, give written notice 24 hours before changing residence, and not move without obtaining his probation officer's approval. (*Id.* at p. 992.) The *Stapleton* court held the residence approval conditions were reasonably related to the defendant's reformation and rehabilitation because the defendant had a history of mental health problems, was required to register as a sex offender, and tested positive for methamphetamine use. (*Id*. at pp. 995-996.)

Similarly, in *People v. Arevalo, supra,* 19 Cal.App.5th 652, the defendant was required to maintain a residence approved by the probation officer. The *Arevalo* court found that although prior approval of a probationer's residence may affect the constitutional rights to travel and freedom of association, it is a permissibly imposed condition if there is an indication the probationer's living situation contributed to the crime or would contribute to future criminality. (*Arevalo*, *supra*, at p. 657.)

Defendant argues *People v. Bauer* (1989) 211 Cal.App.3d 937 is controlling. We disagree. *Bauer* is distinguishable. In *Bauer*, the residence approval probation condition precluded the defendant from living with his parents and was tantamount to a banishment

condition. (*Id*. at p. 944.) Here, in contrast, the residency approval requirement is reasonably related to defendant's supervision and does not ban him from his parents' home. A probation officer supervising a defendant must reasonably know where he resides and with whom he associates to deter future criminality. (*Stapleton, supra,* 9 Cal.App.5th at p. 996.) We therefore reject defendant's contention that the residence approval condition is not rationally related to the state's general goal of rehabilitating defendant and preventing future criminality.

Furthermore, the residence approval condition does not restrict defendant's right to travel or right of association because it does not limit or ban defendant from any neighborhood and he is free to associate or cohabit with whomever he wants. Because no constitutional rights are involved, an overbreadth challenge must be rejected. (Cf. *In re Sheena K., supra,* 40 Cal.4th at p. 890.)

We also reject defendant's contention that the trial court was required to impose limits on the probation officer's "unfettered" discretion. "We view the residence approval condition here in light of [*People v.*] *Olguin* [, *supra,* 45 Cal.4th 375] and presume a probation officer will not withhold approval for irrational or capricious reasons. [Citation.] A probation officer cannot issue directives that are not reasonable in light of the authority granted to the officer by the court. Thus, a probation officer cannot use the residence condition to arbitrarily disapprove a defendant's place of residence." (*Stapleton, supra,* 9 Cal.App.5th at p. 996.)

Therefore, the residence approval probation condition imposed in this case is not unconstitutionally overbroad.

C. *Costs and Fees*

Defendant challenges the sentencing memorandum that requires him to pay probation supervision costs (Pen. Code, § 1203.1b), a court operations fee (Pen. Code, § 1465.8) and conviction fee (Gov. Code, § 70373), and $119.50 for attorney fees (Pen Code, § 987.8). He argues the sentencing memorandum is ambiguous and contends that the trial court must impose the costs and fees by separate orders.

The People agree that the trial court cannot award costs and fees as a condition of defendant's probation, but argue the costs and fees are listed in a separate section entitled "'Additional Orders of the Court,'" and therefore, there is no ambiguity in the court order.

We conclude the sentencing memorandum is ambiguous because the costs and fees could be construed as conditions of probation.

The challenged fees cannot be imposed as conditions of probation. Because the fees are not oriented toward a defendant's rehabilitation, but toward raising revenue for court operations. (*People v. Kim* (2011) 193 Cal.App.4th 836, 842.)

Likewise, the cost of probation supervision and payment of attorney fees cannot be imposed as conditions of probation. (*People v. Hart* (1998) 65 Cal.App.4th 902, 906-907.) These costs are collectible as civil judgments and cannot be imposed as a condition

of probation. (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1401, disapproved on other grounds by *People v. Trujillo* (2015) 60 Cal.4th 850, 858, fn. 5.)

Here, although the trial court imposed the challenged costs and fees in the "'Additional Orders of the Court'" section of the order, the top of page one of the sentencing memorandum states "THE FOLLOWING TERMS AND CONDITIONS ARE ORDERED BY THE COURT." Additionally, on page two of the sentencing memorandum defendant states, "I accept these terms and conditions of probation on pages one and two."

Based on this language, we agree that the order is ambiguous and could be interpreted to include the challenged costs and fees as conditions of defendant's probation. Therefore, the costs and fees must be stricken from the terms and conditions of defendant's probation, and the trial court should modify the order granting probation to clarify that payment of the costs and fees are not a condition of defendant's probation, but rather an order of the court entered at judgment. (See *People v. Flores* (2008) 169 Cal.App.4th 568, 578.)

IV.

DISPOSITION

The trial court is directed to modify the sentencing memorandum by clarifying that defendant is not required to pay probation supervision costs (Pen. Code, § 1203.1b), a court operations fee (Pen. Code, § 1465.8) and conviction fee (Gov. Code, § 70373), and $119.50 for attorney fees (Pen. Code, § 987.8) as a condition of probation. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

RAMIREZ
P. J.

FIELDS
J.